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# Waiver by a Servant of the Master's Statutory Duty

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WAIVER BY A SERVANT OF THE MASTER'S STATUTORY DUTY.

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THESIS PRESENTED BY  
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FOR THE DEGREE OF BACHELOR OF LAWS.

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CORNELL UNIVERSITY.

SCHOOL OF LAW.

1895



# Waiver by a Servant of the Masters Statutory Duty. -----

The case of Simpson v N. Y. Rubber Co. raised a question which was not only novel, but extremely interesting. Whether a servant by continuing in a certain employment with knowledge of the dangerous character of machinery used on the premises, and with further knowledge of his master's neglect or omission to erect certain safeguards about such machinery, as he was by statute required to do, could waive the duty of the master and in case of accident or injury to himself bar his right of recovery against the employer was the question to be adjudicated.

Prior to the case of Simpson v N. Y. Rubber Co. reported in 30 N. Y. Supp. 339, the above question, in this precise form, stripped of any other influential circumstances, had not been raised for adjudication before the courts of this State, and in most of the decisions which seem to settle this question, it will be found upon close examination that although the question was raised in course of the litigation, still the cases were decided upon other points materially different than the question here discussed and what appeared, in the opinion to touch upon the question in hand will be discovered to be nothing more than dictum. The facts and circumstances in the case of George L. Simpson v New York Rubber Co. were as follows:- Simpson was employed by the defendant rubber company in its factory in the town of Fishkill.

His ordinary work place was on the first or ground floor, and his work was the cutting of rubber by hand with a knife, but it was also part of his work to go to the basement which was on the floor below, and get stock and wheel it on a truck across the basement floor to the elevator, and then take it by elevator to the first floor, for use. On the day of the accident, he was engaged in doing his work in the usual manner. He and the other workmen were accustomed to wheel their empty trucks across an operating shaft which ran parallel with the floor, about two inches above it. On one side of the passage crossed by the shaft was the machinery against which the plaintiff fell, the same being entirely uncovered and unprotected, and unsurrounded by proper guards as required by the statute. The plaintiff Simpson, on the day of the accident, was going from the floor above to the basement to get stock, and while attempting to wheel the empty truck across the shaft, he slipped and fell against the unprotected machinery in such a manner that his right arm was caught therein and severely injured.

This action was based on Chapter 673, Laws of 1892, Section 8 of which reads as follows:

" Section 8.- It shall be the duty of the owner of any manufacturing establishment, or his agents, superintendents or other person in charge of the same, to furnish and supply, or cause to be furnished and supplied there-

in, in the discretion of the factory inspector, or of the assistant factory inspector, or of a deputy factory inspector, unless disapproved by the factory inspector, where machinery is used, belt shifters or other safe mechanical contrivances, for the purpose of throwing off or on belts or pulleys; and wherever possible machinery therein shall be provided with loose pulleys; all vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws and machinery of every description therein shall be properly guarded, and no person shall remove or make ineffective any safeguard around or attached to any planer, saw, belting, shafting, or other machinery, or around any vat or pan, while the same is in use; unless for the purpose of immediately making repairs thereto, and all such safeguards shall be promptly replaced. By attaching a notice thereto to that effect, the use of any machinery may be prohibited by the factory inspector, assistant factory inspector or by a deputy factory inspector, unless such notice is disapproved by the factory inspector, should such machinery be regarded as dangerous. Such notice must be signed by the inspector who issues it, and shall only be removed after the required safeguards are provided, and the unsafe or dangerous machine shall not be used in the meantime. Exhaust fans of sufficient power shall be provided for the purpose of carrying off dust from emery wheels and grindstones and dust-creating machinery therein. No person under eighteen years of age and no woman under twenty-one

years of age shall be allowed to clean machinery while in motion".

The complaint expressly charges neglect to comply with this Statute.

The Statute in addition recites that any failure to comply with its provisions, or any act in violation of its requirements shall be a misdemeanor, and inflicts a punishment of fine and imprisonment. The action was tried at Circuit Court on the 5th of October 1893 and judgment for \$5000. was rendered in favor of the plaintiff Simpson. After the introduction of all the evidence the counsel for the defendant moved for a nonsuit which the Court denied, and the defendant appealed to the General Term of the Supreme Court where the judgment of the trial court was affirmed. The argument of the defendant and appellant at the General Term consisted as follows:- It was first urged that the plaintiff's right to recover rests entirely upon proof as to the condition of the machinery, and the defendant seeks primarily to absolve itself from liability on the contention that the plaintiff's ability to recover is barred by the rule of law that a servant assumes all risks obvious and incident to the employment, which rule it is claimed is controlling against the right to succeed. It is furthermore said that this rule permits the employer to select machinery such as is satisfactory to himself and which in his opinion is suited to the uses to which it is to be subjected, and that if a servant enters into the employment or remains therein with full

knowledge of the character and condition of the machinery used on the premises, he voluntarily assumes the risks arising therefrom, Much stress was laid upon this argument and the overwhelming list of authorities which announced this rule would upon first reading tend to convince one that it was unquestionable and insuperable. The law applicable to duties of masters to their servants and employees might well be reviewed here in order that analogies may be more clearly drawn. That when a person entered into the employment of another, he assumed all risks obvious and incidental to the employment, is a proposition that was long ago announced by the courts of almost every civilized country, and has been applied by the courts time and again until at present the cases in which this question has been adjudicated are almost innumerable (a)

From the list of authorities just cited, the firmness with which this rule has been held by the courts, will be seen with little difficulty. The rule is comprehensively laid down in the case of *Sweeney v Berlin & Jones Envelope Co.* 101 N. Y. 520 and (a) *Gibson v Erie Railway Co.*, 63 N. Y. 449.

*Sweeney v Berlin & Jones Envelope Co.*, 101 N. Y. 520.

*Hickey v Taffee*, 105 N. Y. 26.

*Cahill v Hilton*, 106 N. Y. 312.

*Stringham v Hilton*, 111 N. Y. 188.

*Bohn v Hevemeyer*, 114 N. Y. 296.

Also cases cited under each of the above cases.



reads as follows:-

"A servant accepts the service, subject to the risks incident to it; and where, when he enters into the employment, the machinery and implements used in the master's business are of a certain kind or condition, and the servant knows it, he voluntarily takes the risks resulting from their use". The reason and justice upon which the above rule stands are too well known and for our purposes need not be considered here. For the safety and protection of the servant and also in reciprocation of the risks imposed upon the workman, the common law imputes to the employer certain duties, and requires him to supply certain safeguards and a breach of these duties or an omission to provide such protection, resulting in injury to the employed, will, in cases where the injured person was free from contributory negligence, and had no knowledge of these misdoings of his master, or if he did not expressly or impliedly waive these duties of the person engaging him, will make the neglectful employer responsible in damages to his injured servant.

Necessity and public policy are the grounds upon which these duties are imputed to the master and for a breach thereof, it is strictly equitable that he should respond in damages to the party afflicted. The law has seen fit to impose upon the master the duty of furnishing his servant with a reasonably safe place in which he can carry on his work and in addition to this duty the

following others; he must furnish a sufficient number of competent fellow workmen, reasonable rules and regulations, tools which are reasonably safe for the use of the workmen, and reasonable instruction and information. When the master has furnished these and a servant sustains an injury, the loss must lie where it falls and the law which required the performance of the above specified duties by the master leaves him free from liability. The master has done all that he is legally required to do and has thus invoked the protection of the law which will not be denied him.

But on the other hand, should the master or employer, by neglect or omission fail to provide these enumerated safeguards required by the law, thereby increasing the risk which the servant is by law presumed to accept on entrance into the service, and in consequence of his failure to so provide, the servant suffers harm to his person, the legal protection shifts from the master to the servant and a remedy co-extensive with the damage is allowed to the injured employee.

To cover the above rules in a few words, we may say that if the master provides the five requisites already mentioned, he is in all cases absolved from liability, but if he fails to do so, the servant is permitted to recover providing no other qualifying circumstances exist.

Now as to qualifying circumstances, if any there may be. Let us suppose that a man enters a factory as operator of machinery

used for manufacturing purposes. He is in and about the premises each day attending to his work. While operating the machinery, he discovers that it is out of repair or otherwise unsafe and dangerous to use. The master meanwhile, although required by law to put such machinery into a reasonably safe condition, has no knowledge of the fact that the machinery has fallen into disrepair and has become dangerous to use and as a natural result, the unsecure condition of the machinery unaltered remains. The servant knowing well that it is at least negligent to use the machinery while in such a condition, nevertheless continues to operate it until finally a severe injury befalls him. What then is the just and equitable rule in such a case? The law weighing the facts and circumstances without prejudice and with a strict regard for fairness and public policy, says to the servant, it is time that you are badly injured and that the injury would not have befallen you had your employer furnished you with such machinery as he was by law required, still you were well aware of his omission and as a man possessing an ordinary amount of care and prudence, you should have foreseen that a continued use of complicated machinery which had fallen into disrepair would naturally and probably result in some injury to you, and therefore although probably there was an omission on the part of your master, still your right to proceed against him is barred upon the following grounds: first, that you consented to your injury thus making your conduct the

proximate cause of your injury, and secondly, by your continuance in the employment you tacitly permitted the master to dispense with furnishing a better condition of machinery. You, by your silence, intimated that you were satisfied.

At common law the servant would without doubt be barred and he would be deemed to have waived his master's duty. In the case of *Thompson v N. Y. Rubber Co.*, existed one fact which furnished a basis for the plaintiff in the case to stand upon. It was this. In addition to the five duties incumbent upon the master which were heretofore enumerated, the legislature of the State of New York added another, namely, that (according to the terms of the statute herein given at length) the master should place certain guards around exposed cogs and gearings. Under the law as announced by the courts, the fivefold duty of the master to his servant were imposed as natural demands of necessity and public policy. The courts required of the master the reasonable performance of these duties and did not dictate that they should be performed in this way or that. For example, they required that the master should furnish a reasonable number of competent fellow workmen and this was presumed to have been done until it was shown to be otherwise. As each case arose the court from the facts and circumstances, draws its inferences as to whether the master had discharged his duties or not. Although the courts declared that machinery should be reasonably safe, still

they prescribed no means which the master should employ in making it so. So long as the machinery was to a reasonable extent safe the requirements of the law remained fulfilled. According to the construction given to the statute, its terms must be complied with literally; whether the machinery is reasonably safe or not, is not to be considered, but unless the machinery is guarded in the manner prescribed, the master's liability becomes absolute. In the Simpson case, the machinery had been in use for some thirty years during which time, it was operated with perfect safety and without injury to the employees of the mill. It was prominently located, of large dimensions and plainly open to view. It was not like a trap set in some obscure part of the mill which one might fall against without warning, but on the contrary was as openly visible as any machinery could be and it is doubtful whether any injury might have been rendered possible save for the existence of some extraordinary circumstances or some negligent conduct on the part of the one sustaining the injury. The plaintiff in this case was himself employed in the mill, for a period of two years preceding the accident and was well acquainted with the location, condition and character of the machinery which occasioned his injury. He had worked in its vicinity and around it and passed and re-passed it several times daily. The injury which he received followed an accidental slipping and but for the occurrence of this unforeseen accident, no injury would have been

inflicted by reason of the unguarded machinery upon which he casually fell.

That, at common law, independent of any statute, the machinery was reasonably safe, is not disputed but although reasonably safe, the omission to provide the boxings specified in the statute, made the employer's liability as extensive as if under the common law he had left the machinery in a condition of disrepair and imminent danger to those in its vicinity. When the courts announced the well settled doctrine regarding the acceptance by the servant of the risks incident to the employment, many years ago, and also the doctrine relative to the master's duty to his servant, the ends which they sought to attain were as follows. Under the rule first mentioned the courts clearly intended to protect the employer from innumerable actions for damages alleged to have been caused in consequence of his neglect or inadvertance. This rule was founded upon the reasoning that, the employee stood in a much better attitude to observe the condition of his tools and implements of work, and that for him to continue to use tools which were, in consequence of inferiority of make or construction, or because of their condition of disrepair, unsafe and hazardous to continue to use, was negligence, and he was by such conduct deemed to have contributed to his injury.

In order that the lives of persons of employees should not be placed in constant danger and peril, and for the protection

of servants did the courts, many years in the past promulgate the rules which devolved upon the master the duty of providing reasonable protection for those who are in his employ. These duties were laid upon them master in part, to counteract such bad results as might ensue from limiting the right of the servant to recover, to those cases where his injury was occasioned by some neglect on the part of the master in the absence of waiver or contributory negligence, and furthermore for the purpose of limiting the risk which careless employees would be inclined to take. If the rules were otherwise, great injustice and hardship would continually follow. To require the employer to furnish such articles as are in each particular case reasonably safe and secure to the workman, leaves for the workman a risk which is relatively and comparatively small. An injury falling upon the servant after the performance by the master of his legal duty, can only be possible in the following instances: either by some fault or negligence on the servant's part contributing to the injury or by a condition of machinery etc. reasonably safe in their nature, or by some inevitable accident. In either of which cases, a law holding the master liable would be manifestly unjust and inequitable. In the first case because the injury was inflicted by the hand of the servant himself and in the second and third cases because neither was to blame, and in consequence the loss must remain where it fell.

Thus it will be observed that the main defense of the defendant in this case was that of contributory negligence amounting to a waiver of duty. In addition to the arguments here given Mr. Thomas Beven in his admirable treatise on the Principles of the Law of Negligence lays down the following rules of law as being applicable to the statement of facts herein. "That a person guilty of contributory negligence should not recover even when the injury arises from a neglect to observe a statutory duty is not only reasonable but clear law. For in such a case the plaintiff has failed to establish the proposition on which alone he is entitled to recover damages that the injury happened through the defendant negligence." Continuing he says "Where the master is under a statutory liability to take precautions, the presumption of law is that as between the master and the workmen working in the absence of statutory safeguards the master is not discharged but this can be rebutted by clear proof of an undertaking of the employment by the workmen with knowledge of the risk involved. Thus laying down a train of reasoning similar to that used by the defendant in this case, the a

The argument of the defendant closed as follows the counsel urged that as the obligations imposed upon the employer both by common law and by statute were for the benefit



and protection of the servant, he could with adequate consistency and regard for public policy waive either for the result in both cases would be similar.

On the part of the plaintiff the following argument was offered. That the statute hereinbefore mentioned was mandatory and could under no circumstances be waived by any act of an employee: and also to permit the waiver of a duty imposed by the Legislature was in contravention of public policy and consequently invalid. The plaintiff denied the allegation of contributory negligence and claimed that he fell upon the machinery in consequence of an accident which as to him was unavoidable.

It was no doubt the intention of the Legislature that the letter of the statute should be complied with and any deviation therefrom was intended to impute a liability to the person so violating it which was to be absolute and unaffected by any attending circumstances and the court finds justification for its holding by deciding the case according to the intention of the framers of the statute. But with regard to the ground of public policy upon which the decision was partly based there is ample room for doubt as to its comparative soundness.

Why the waiver of a statutory duty, namely the boxing

of certain cogs, gearings etc, is any more opposed to public policy, than the waiver of the duty of the master to provide a competent number of fellow workmen I cannot see for in case of the waiver of statutory or legislative duty, or common law or court imposed duty, the result is the same. Furthermore the imposition of a penalty recited in the statute seems to be a sufficient punishment for its violation in consideration of the circumstances of facts amounting to waiver and contributory negligence which would have existed at common law.

In conclusion, I offer the opinion rendered by Judge Cullen at a General Term of the Supreme Court:-

"The serious question in the case, is the waiver by the plaintiff of the requirements of the statute. The learned judge was asked to charge that if the defendant failed to properly guard the shaft and cog wheel, and the plaintiff knew it and still continued in defendant's employ, he waived the provision of the statute in that regard, and assumed such obvious risks as were incident to the use of the machinery in that condition. This the court refused and the defendant excepted. This request and refusal fairly raises the question.

The general rule settled by authority is "A servant accepts the service subject to the risks incident to it and

"where, when he enters in the employment, the machinery and  
 "implements used in the master's business are of a certain  
 "kind and condition, and the servant knows it, he voluntarily  
 "assumes the risk resulting from their use, and can make no  
 "claim upon the master to furnish other or different safe-  
 "guards."

"But the question presented in this case is a different  
 one. The statute has enacted that certain safeguards shall  
 be had for the security of employees of the factory. The  
 failure to provide these statutory safe-guards is criminal.  
 It is doubtless true that parties can waive statutory pro-  
 visions for their benefit and can even make law for themselves  
 which the courts are bound to administer, provided there is  
 no question of public policy involved.

"But is there no question of public policy involved here?  
 To our mind there is, and that public policy should induce us  
 to hold, unless a contrary doctrine is settled by authority,  
 that the statutory protection cannot be waived. Our notion  
 of government has confined State interference with the free-  
 dom of individual action within narrow limits, but such inter-  
 ference has never been wholly prohibited. Experience s has  
 shown that in some matters persons must be protected from  
 their own imprudence. If there were to be considered only

the interests of the individual in his personal security, the statute would be unnecessary. The end sought to be accomplished could equally well be secured by contract with the employer and the employee. The matter has always been a subject of contract that is no law has ever forbid employees making the guarding of machinery a condition of their service. Yet such contracts are unknown. If, therefore, assent can dispense with the statutory protection, the subject for practical purposes is left in the same condition as it was before the enactment of the statute.

"But the State has great interest in the protection of its members, and this even of the most utilitarian character. In the case of a maimed employee, he and his family are likely to become a public charge; the same is true of the family of an employee killed. The community would seem to have as much interest in the property of the life and limbs of a member of it, as in the question whether he should pay 8 per cent. or 6 per cent. interest. Yet by no means which human wit can devise can he make a valid contract to pay more than 6 per cent. in this State. The doctrine of waiver or contributory negligence under this statute is but the equivalent of the contention "in pari delictu" under the usury statute, a claim always repudiated by the courts. We admit

that the terms of the usury law differ from those of the statute under consideration. But the present form of the usury law is simply the result of a long strife between the legislature and the courts, the latter trying to avoid the effect of the legislature, a strife in which the legislature eventually proved victorious. Nor is the legislation under discussion analogous. At the present time there seems to be a tendency to reaction in the doctrine of non-interference. Within a few years the State has prescribed the prices to be paid for elevating grain in the port of New York, by private individuals who possess no franchises nor even special facilities for the business. Yet this legislation is held valid both by the Court of Appeals and by the Supreme Court of the United States.